UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--X

GALLIE DOSSOU, :

Plaintiff, : Civil Action No. 13 CV 2800 (GBD) (KNF)

- against - :

REYER PARKING CORP. and GERALD LIEBLICH, :

:

Defendants.

:

--X

DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO DISMISS

ZANE AND RUDOFSKY
Attorneys for Defendants
The Starrett Lehigh Building
601 West 26th Street, Suite 1315
New York 10001
Tel: (212) 245-2222
Fax: (212) 541-5555

Edward S. Rudofsky,,

Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--X

GALLIE DOSSOU, :

Plaintiff, : Civil Action No. 13 CV 2800 (GBD) (KNF)

- against - :

REYER PARKING CORP. and GERALD LIEBLICH, :

Defendants. :

--X

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Introduction

This memorandum is submitted in support of defendants' motion to dismiss.

The facts are straight forward and set forth in the accompany declaration of Gerald Lieblich, dated May 15, 2013 and the exhibits thereto.

Essentially, this motion is based upon the simple fact that defendant Reyer Parking Corp. has no payroll or employees whatsoever and is not the employer of plaintiff, Gallie Dossou, no matter what legal standard or test is applied. Moreover, the actual employer (FDD Enterprises, Inc.) and the operator of the garage at which the plaintiff is employed (Peak Time Parking, Inc.) have not been named as defendants herein. Furthermore, Gerald Lieblich, the President of Reyer Parking Corp. has no relationship whatsoever with either FDD Enterprises, Inc. or Peak Time Parking, Inc. and is not liable for plaintiff's claims.

Argument

Point I

DEFENDANTS ARE NOT PLAINTIFF'S EMPLOYER

Plaintiff asserts claims under (a) the Fair Labor Standards Act, (b) the New York Labor Law, and (c) the common law (for unjust enrichment). All of these claims are dependant upon plaintiff's lynchpin allegation that he is an employee of the named defendants.

A. Under the FLSA

For purposes of the Fair Labor Standards Act, "the term 'employee' means any individual employed by an employer". See 29 U.S.C. § 203(e)(1). An entity "employs" an individual under the FLSA if it "suffer[s] or permit[s]" that individual to work. 29 U.S.C. § 203(g). Here, defendants clearly do not come within this definition since "as a matter of economic reality" Reyer Parking Corp. does not "function[ ] as the individual's employer." *See*, Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61 (2nd Cir. 2003):

> An entity "suffers or permits" an individual to work if, as a matter of "economic reality," the entity *functions* as the individual's employer. *See Goldberg v. Whitaker House Coop., Inc.,* 366 U.S. 28, 33 ... (1961) (explaining that "economic reality" rather than 'technical concepts' is ... the test of employment" under the statute); *see also Herman v. RSR Security Services Ltd.,* 172 F.3d 132, 139 (2d Cir.1999) ("[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question.") *[Emphasis added.]*

At bar, the complaint erroneously pleads that defendants were the actual (and only) employer of plaintiff, whereas the facts are clear that plaintiff's employers are FDD Enterprises, Inc. (the admitted employer) and Peak Time Parking, Inc. (the garage operator), and the defendants are merely the affiliate of the Landlord (1872 East Tremont Corp.) which holds a license to operate a garage at the premises, and the President of the Landlord and its affiliate (Gerald Lieblich), who have no relationship with FDD or Peak Time (other than rental of the property) and are not an "employer" of plaintiff for purposes of the FSLA.

B. Under the New York Labor Law

For purposes of the New York Labor Law, an employer is defined as one who "suffered or permitted" an individual to work. See New York Labor Law, §§ 2, subds. 6 and 7; see, also, § 651(6). This is the same "economic reality" test as under the FLSA, discussed *supra,* and the two should be applied consistently with one another. *See,* Doo Nam Yang v. ACBL Corp., 427 F.Supp.2d 327, 342 n. 25

(S.D.N.Y. 2005) ["The 'economic reality' test will be used to determine whether [defendant] is [plaintiff's] 'employer' as defined under both state and federal law, as '[t]here is general support for giving FLSA and the New York Labor Law consistent interpretations.' *Topo v. Dhir,* No. 01 Civ. 10881, 2004 WL 527051, at *3 (S.D.N.Y. Mar. 16, 2004)."]

C. For Purposes of An "Unjust Enrichment" Claim

Given that defendants are not plaintiff's employer and do not pay his wages, and accordingly have not "withheld wages" from him and thereby been "unjustly enriched," plaintiff's third cause of action, for unjust enrichment, fails of its own weight and should be dismissed. *See, generally,* Corsello v. Verizon New York, Inc., 18 N.Y.3d 777 (2012):

> The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff .... In a broad sense, this may be true in many cases, but *unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff.* Typical cases are those in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled .... An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim .... [Citations omitted; *emphasis added.*]

POINT II

PLAINTIFF HAS FAILED TO JOIN REQUIRED PARTIES

Despite being advised of the actual facts, plaintiff has conspicuously failed to join the admitted employer, FDD Enterprises, Inc. and the garage operator for whom plaintiff works, Peak Time Parking, Inc. Both of these entities are parties in whose absence, "the court cannot accord complete relief among existing parties" and are "so situated" vis-à-vis the plaintiff that "disposing of the action in [their] absence may ... as a practical matter impair or impede [their] ability to protect [their] interest[s]". *See,* Fed.R.Civ.Pr. 19(a)(1)(A) and (B)(i). This is so because any favorable determination of this action would potentially have either preclusive or precedential effect and thereby adversely affect the ability of the unjoined parties to defend against any similar claim against them (or either of them) in a subsequent action.

Accordingly, if not dismissed on the ground that defendants are not plaintiff's employer, and therefore not liable on the claims asserted by him (*see* Point I, *supra*), this action should be dismissed for failure to joint required parties pursuant to Fed.R.Civ.Pr. 12(b)(7), *See, generally,* Viacom Intern., Inc. v. Kearney, 212 F.3d 721 (2nd Cir. 2000) (Sotomayor, J.):

Fed.R.Civ.P. 19 sets forth a two-step test for determining whether the court must dismiss an action for failure to join an indispensable party. First, the court must determine whether an absent party belongs in the suit, *i.e.,* whether the party qualifies as a "necessary" party under Rule 19(a). *** Rule 19(a) provides that the absent party should be joined, if feasible, where:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a). If a party does not qualify as necessary under Rule 19(a), then the court need not decide whether its absence warrants dismissal under Rule 19(b). *** But where the court makes a threshold determination that a party is necessary under Rule 19(a), and joinder of the absent party is not feasible for jurisdictional or other reasons, *see* Fed.R.Civ.P. 19(b) (stating that, if an absent party satisfies the Rule 19(a) standard, a court must next assess the feasibility of joinder before conducting a Rule 19(b) analysis); 4 *Moore's Federal Practice* § 19.02[3][b] (3d ed.1999) (identifying situations where joinder of an absent party is not feasible), the court must finally determine whether the party is "indispensable." If the court determines that a party is indispensable, then the court must dismiss the action pursuant to Rule 19(b). *** Rule 19(b) provides:

> [T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the

> judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed.R.Civ.P. 19(b).

[Citations omitted.]

According to the Advisory Committee, the purpose of the 2007 Amendments to Rule 19 was to make it "more easily understood" and "stylistic only," not to change the substance of the Rule as it was previously interpreted and applied. *See* Advisory Committee Notes to 2007 Amendment.

Defendants accordingly urge that "in equity and good conscience" this action should not proceed (if at all) without FDD Enterprises, Inc. and Peak Time Parking, Inc. - - the actual employer(s) of the plaintiff - - being joined herein.

[Continued on following page.]

Conclusion

For the reason sets forth in the moving declaration of Gerald Lieblich, and the exhibits annexed thereto, and as settle above, this action should be dismissed and defendants granted such other, further and different relief as is just, necessary and proper.

Dated: New York, New York
May 16, 2013

Yours, etc.,

ZANE and RUDOFSKY
Attorneys for Defendants
601 West 26th Street, # 1315
New York, New York 10001
(212) 245-2222

By:____________________________
Edward S. Rudofsky